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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re:

ROBERT DAVID SUER,

Debtor.

KAN-DI-KI, LLC, d/b/a DIAGNOSTIC
LABORATORIES,

Plaintiff,

v.

ROBERT DAVID SUER,

Defendant.

Case No.

**KAN-DI-KI, LLC D/B/A DIAGNOSTIC
LABORATORIES' MOTION FOR AN
ORDER TO SHOW CAUSE WHY
DANIEL ALMBLADE SHOULD NOT
BE HELD IN CONTEMPT AND TO
COMPEL THE APPEARANCE OF
DANIEL ALMBLADE AT A
TELEPHONIC DEPOSITION**

**Related Case Pending:
United States Bankruptcy Court for the
Central District of California, Santa Ana
Division, Case No. 8:14-bk-10082-ES, Adv. No.
8:14-ap-01124-ES**

Kan-Di-Ki, LLC d/b/a Diagnostic Laboratories ("DL") hereby submits its motion ("Motion") for issuance of an order (1) to show cause why Daniel Almblade ("Almblade") should not be held in contempt for his refusal to comply with a deposition subpoena ("Deposition Subpoena"), specifically, his refusal to answer numerous questions about relevant matters; (2) compelling Almblade's attendance at a telephonic deposition to

1 furnish testimony that he previously refused to provide; and (3) awarding fees and costs.
2 This Motion is supported by the following Memorandum of Points and Authorities and the
3 Declaration of Lucas Franklin, attached herewith as **Exhibit 1** (“Franklin Declaration”).

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 Debtor-Defendant Robert David Suer (“Suer”) is a debtor in a chapter 7 case
7 pending before the Honorable Erithe A. Smith in the United States Bankruptcy Court for
8 the Central District of California, Santa Ana Division (the “Bankruptcy Court”). The
9 bankruptcy case is captioned *In re Suer*, No. 8:14-bk-108093-ES (Bankr. C.D. Cal.) (the
10 “Bankruptcy Case”). Shortly after the Bankruptcy Case began, DL commenced an
11 adversary proceeding (the “Adversary Proceeding”), which is captioned *In re Suer (Kan-*
12 *Di-Ki, LLC, d/b/a/ Diagnostic Laboratories v. Suer)*, No. 8:14-ap-01124-ES (Bankr. C.D.
13 Cal.). In the Adversary Proceeding, DL contends that debts owed by Suer to DL are non-
14 dischargeable under sections 523(a)(6) and 727(A)(2)-(4) of Title 11 of the United States
15 Code.¹

16 Section 523(a)(6) provides that a discharge under the Code does not discharge any
17 debt “for willful and malicious injury by the debtor to another entity or to the property of
18 another entity.” 11 U.S.C. § 523(a). Thus, a key issue pertinent to DL’s section 523(a)
19 claims is whether Suer inflicted “willful and malicious injury” on DL. Evidence collected
20 and presented in DL’s action against Suer in a separate case in Delaware Chancery Court
21 (further defined and described below) establishes that, for years, Suer has been engaged in
22 a scheme to injure DL by, among other actions, deliberately sabotaging DL’s customer
23 relationships. DL has received a communication from Almblade’s former employer
24 showing that Almblade has conspired with Suer in connection with key parts of the
25 ongoing scheme. Thus, DL issued the Deposition Subpoena and deposed Almblade in
26 Phoenix, Arizona, in an attempt to discover the details of Suer’s ongoing sabotage

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28 ¹ Unless otherwise specified, all section numbers refer to the United States
Bankruptcy Code, codified at Title 11 of the U.S. Code.

1 scheme. However, at the deposition, Almblade refused to testify as to key evidence
2 regarding these matters. On advice of counsel, Almblade refused to answer any questions
3 related to conversations, events, or any other matters that occurred after February 19,
4 2014, even questions that sought information about Suer's malicious scheme. As the only
5 basis for this refusal, Almblade's counsel cited to the Bankruptcy Court's unrelated
6 discovery order requiring Suer to produce responsive documents to DL dated through
7 February 19, 2014. (Order Granting Plaintiff's Motion to Compel Discovery *In re Suer*
8 (*Kan-Di-Ki, LLC, d/b/a/ Diagnostic Laboratories v. Suer*), No. 8:14-ap-01124-ES (Bankr.
9 C.D. Cal. Feb. 1, 2016), ECF No. 91 ("Order Compelling Production" or "Order"),
10 attached as **Exhibit I** to the Franklin Declaration.) But that Order dealt with wholly
11 separate claims, issues, and evidence and had no applicability whatsoever to Almbalde's
12 obligations to testify about his involvement in the ongoing sabotage scheme (which
13 commenced long before Suer filed his chapter 7 petition and directly relates to the issue of
14 malice under section 523(a)).

15 Because Almblade's refusal to testify violates the Deposition Subpoena, this Court
16 should issue an order (1) to show cause why Almblade should not be held in contempt,
17 (2) compelling Almblade to appear and answer questions at a telephonic deposition, and
18 (3) awarding fees and costs.

19 **II. BACKGROUND**

20 **A. Historical Background Relevant to Suer's Malicious Scheme to Hurt DL**

21 Suer formerly worked as a sales executive for DL or its predecessor. The
22 relationship, which lasted for years—on and off—was contentious. Suer was terminated
23 or relieved from his responsibilities on more than one occasion, and he frequently
24 expressed feelings of bitterness and an intention to hurt DL by taking away customers.
25 Although Suer had contracts with DL with restrictive covenants that prevented Suer from
26 taking actions that would hurt DL's business, Suer disregarded them. *See generally*
27 Memorandum Opinion of Delaware Chancery Court, July 22, 2015, at 6-18
28 (Memorandum Opinion, attached as **Exhibit A** to the Franklin Declaration.)

1 After Suer's contact with DL's employees and customers was terminated, Suer
2 continued to be bound by contractual covenants not to compete, not to use or disclose
3 confidential information, and not to interfere with DL's relationships, including its
4 customer relationships. Through May 2012, DL continued to pay Suer a monthly sum.
5 While still on DL's payroll, Suer again violated his restrictive covenants and began
6 "consulting" for North American Health Care, Inc. ("North American"), a health care
7 management company that managed many long term care facilities to which DL provided
8 mobile diagnostic services ("North American Facilities"). In his work for North
9 American, Suer unlawfully claimed that DL had overcharged the North American
10 Facilities. Suer also improperly replaced DL with other vendors at the North American
11 Facilities. In addition, he wrongfully used and disclosed DL's confidential business
12 information.

13 When DL learned of Suer's activities, an attorney for DL emailed Suer and his
14 attorney, advising Suer: "You should stand down from your current activities with DL's
15 competitors and customers and comply in full with all applicable agreements to which you
16 are a party with us." (*Id.* at 18.) Thereafter, Suer did not stand down. Instead, he
17 persisted in his charges of overbilling, and helped persuade 27 North American Facilities
18 to cancel their contracts with DL, costing DL millions of dollars of business.

19 On October 10, 2012, DL filed a complaint in the Chancery Court of Delaware (the
20 "Delaware Action"), to enforce its covenants with Suer and to prevent him from further
21 harming the company. After trial, the Delaware Chancery Court held that Suer breached
22 his covenants not to compete with DL, covenants not to disclose DL's confidential
23 information, and covenant not to interfere with DL's business and that DL was entitled to
24 injunctive relief. (*Id.* at 83-84.)

25 B. Suer's Scheme to Use Discovery to Cause Additional Harm to DL's Customer
26 Relationships, And Almblade's Role In It

27 During the Delaware Action, Suer hatched a plan which, like his North American
28 scheme, sought to harm DL's customer relationships with allegations of overbilling.

1 Specifically, Suer schemed to depose some of DL's important customers and show them
2 exhibits about Suer's work at North American in an attempt to disparage DL and harm
3 DL's business relationships. Suer enlisted Almblade as his accomplice in this malicious
4 scheme. DL eventually learned of the scheme from Almblade's former boss, Steve Olds,
5 who sent DL's in-house counsel an email that disclosed what Almblade told him about the
6 scheme. (Letter dated 10/1/14 from S. Olds to T. McCaffery, attached as **Exhibit B** to the
7 Franklin Declaration.) The scheme, which began pre-bankruptcy, unfolded as follows.

8 On July 2, 2013, more than six months before Suer declared bankruptcy, Suer
9 advised DL in the Delaware Action that he would be calling witnesses from six of DL's
10 largest customers, including a representative of Plum Healthcare ("Plum"). (Suer's
11 Supplemental Response to Interrogatory No. 1, dated 7/2/13, attached as **Exhibit C** to
12 Franklin Declaration). DL was suspicious, as these witnesses had nothing to do with DL's
13 claims against Suer and they had no knowledge that would have been relevant to DL's
14 claims. DL's lawyers spent considerable time and expense trying to understand Suer's
15 motivations and what possible relevant information these third parties might have.

16 On August 15, 2014, Suer deposed Almblade in the Delaware Action. At the time,
17 Almblade was employed by a company called LTC/Medliance ("Medliance"). Medliance
18 provides services to healthcare facilities, specifically, the evaluation of vendors' proposals
19 in response to requests for bids, and the adjudication of bills (including, for example,
20 negotiating reduced costs or itemized reductions to invoices). At the time of Almblade's
21 deposition, he (as part of his work for Medliance) was evaluating a major proposal DL had
22 submitted to Medliance in response to a request for proposal by DL's major customer,
23 Plum. As with the other third party witnesses that Suer previously identified, DL incurred
24 substantial time and expense trying to determine the purpose and prepare for the
25 deposition.

26 Almblade admitted at the deposition that he knew nothing about the dispute
27 between Suer and DL, and he further testified that Suer asked him to be deposed because
28 Almblade would find it "very informative." (Deposition Excerpts attached as **Exhibit D**

1 to Franklin Declaration; Almblade 69:19-70:5; 77:1-8.) In addition, in keeping with
 2 Suer's sabotage plan, Suer's counsel marked as an exhibit and showed Almblade a letter
 3 to DL from North American, accusing DL of overbilling. (*Id.* at 36:13.)²

4 On October 1, 2014, DL received the aforementioned email from Mr. Olds, the
 5 CEO of Medliance. (**Exhibit B** to the Franklin Declaration.) Mr. Olds explained, in
 6 relevant part:

7 Approximately two months ago, Dan [Almblade] came into my
 8 office and told me that Bobby Suer had a scheme to put pressure
 9 on Diagnostic Labs in response to the litigation initiated by
 10 Diagnostic Labs. Dan wanted me to meet with Bobby Suer to
 11 work out an agreement whereby I would talk to other [skilled
 12 nursing facility] operators to put pressure on DL to back off of
 13 Bobby. [. . .] ***Dan explained that Suer was going to give
 questions to his attorneys to use during depositions to bring
 out the Diagnostic Labs overbilling practices and the
 appropriate auditing actions to find the overbilling. Dan
 [Almblade] implied that the agreement with Suer would be a
 win-win; Suer gets revenge on Diagnostic Labs and Medliance
 gets new business through Dan.***

14 (*Id.* at 3 (emphasis added).)³

15 B. Almblade's Deposition in the Adversary Proceeding

16 Given Almblade's involvement in Suer's attempt to "get revenge" on DL, DL
 17 sought Almblade's deposition in the Adversary Proceeding. On February 9, 2016,
 18 Almblade was properly served with the Deposition Subpoena outside of his home in
 19 Scottsdale, Arizona, which is attached as **Exhibit E** to the Franklin Declaration.
 20 Notwithstanding correspondence between the parties in the three weeks leading up to
 21 Almblade's deposition, neither Suer nor Almblade⁴ objected to the Deposition Subpoena.

22 _____
 23 ² Thereafter, Almblade appeared in Delaware to testify on behalf of Suer and,
 within weeks, Almblade received a lucrative consulting contract with North American
 (according to filings in North American's Chapter 11 bankruptcy case).

24 ³ According to Olds, Suer first approached Almblade with the scheme, and then
 25 Almblade approached Olds. Olds refused to participate and informed DL once he learned
 that Almblade's deposition had been part of the scheme. (*Id.*)

26 ⁴ Notably, during Almblade's deposition, he admitted that Douglas Fuchs, counsel
 27 to North American (Suer's employer) had called him prior to his deposition and
 28 recommended counsel to represent Almblade. Almblade improperly refused to answer
 whether he was paying for his own counsel. It appears that Suer or North American may
 be footing the bill. Deposition Transcript 7:6-8:9; 31:19-33:7.

1 Nor did anyone seek a protective order or a file a motion to quash. Yet, in the eleventh
2 hour, the evening before the deposition and after DL's counsel was on a plane to Arizona
3 to take it, counsel for Almlade sent a letter to DL's counsel, which is attached as **Exhibit**
4 **F** to the Franklin Declaration, and provides in part:

5 [I]t is my understanding that the bankruptcy petition was filed
6 on January 7, 2014, and the judge limited certain document
7 discovery to February 19, 2014 and prior. Thus, I will be very
8 careful in allowing any questions related to conversations or
events past the bankruptcy petition date.

9 At the outset of the deposition in Phoenix, Arizona, DL's counsel disagreed that the
10 Order Compelling Production limited the deposition's scope. DL's counsel explained, "if
11 you review the [Bankruptcy] Court's ruling, you would see that it has nothing to do with
12 depositions" and "[d]epositions were never even discussed at the hearing on the motion to
13 compel." Almlade Dep. 19:21-25, Mar. 1, 2016.⁵ Moreover, DL's counsel informed
14 Almlade that he would ask the necessary questions to establish a record, and, if
15 Almlade refused to answer, DL reserved its rights to seek Court intervention. *Id.* at 19:8-
16 16. Notwithstanding this warning, Almlade's counsel repeatedly objected to, and
17 instructed Almlade not to answer, questions about the Suer-Almlade sabotage scheme
18 described by Olds. Thus, the time and expense for DL's counsel to prepare for, travel to
19 and attend the Almlade deposition were for naught.

20 C. Order Compelling Production

21 The parties have engaged in prior disputes relating to DL's requests for production
22 of documents directed to Suer. To summarize, following a motion to compel, a joint
23 stipulation, and hearing ("Hearing"), the Bankruptcy Court ordered Suer to produce all
24 documents dated through February 19, 2014 that are responsive to certain of DL's
25 requests. *See* Order Compelling Production, at ¶¶ 2-10, Exhibit I. As the Hearing
26 transcript confirms, the time restrictions in the Order Compelling Production apply

27 _____
28 ⁵ A copy of the transcript of Almlade's March 1, 2016 deposition is attached to
the Franklin Declaration as **Exhibit G**.

1 primarily to DL's requests related to its *section 727(a)* claim, specifically because that
2 claim "refers to 'an intent to hinder, delay or defraud a creditor by disposing property
3 *within one year of the bankruptcy*,'" and Suer filed his bankruptcy petition on January 7,
4 2014.⁶ Mot. Compel Hr'g Tr. 19:13-16, Jan. 5, 2016 (emphasis added).⁷ *See also id.* at
5 19:4-6 (THE COURT: "I'm specifically talking about – because you referenced
6 727(a)(2)(a) . . . that's for a limited period for one year before [the petition date]. MS.
7 WIENER: Yes, your honor."); *id.* at 24:15-18 ("THE COURT: And I'm sorry, this relates
8 to the 523(a)(6) claim? Which claim does this relate to? MS. WIENER: I think it relates
9 primarily to the 727, because it goes to his finances . . .").

10 Indeed, the Bankruptcy Court acknowledged that, although document requests for
11 postpetition information might not be proper as to DL's section 727 claims, that was not
12 necessarily true of its section 523 claims. *See id.* at 16:22-16:25 ("THE COURT: -- to the
13 extent that there were any [documents] . . . that took place post petition, they're not going
14 to be covered by 727, correct? MS. WIENER: That's correct, your honor.").

15 In contrast, here, the discovery sought from Almblade does not even remotely
16 relate to Suer's financial information for DL's *section 727(a)* claims. Rather, DL's
17 questions related only to malice and DL's *section 523(a)* claims, which do not implicate
18 either the Order Compelling Production or the timeframes enunciated therein. Thus,
19 because the time limitations in the Order Compelling Production do not govern
20 depositions or discovery related to DL's section 523 claims, Almblade was required to
21 provide full responses to DL's questions and failed to do so.

22
23
24
25
26 ⁶ For reasons not material to this motion, the Bankruptcy Court extended the
27 relevant date for Suer to produce documents related to DL's section 727 claims through
the section 341 meeting of creditors, which occurred on February 19, 2014.

28 ⁷ A copy of the transcript of the January 5, 2016 hearing on DL's motion to compel
is attached to the Franklin Declaration as **Exhibit H**.

III. ARGUMENT

A. The Court Should Issue an Order to Show Cause Why Almblade Should Not Be Held in Contempt

The Federal Rules of Civil Procedure provide that “[t]he court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order relating to it.” Fed. R. Civ. P. 45(g).

Here, Almblade failed to comply with the Deposition Subpoena by refusing to testify as to any events, conversations, or other matters occurring after February 19, 2014. No such limitation was placed on his deposition by any Bankruptcy Court order—including the Order Compelling Production—nor did the Deposition Subpoena itself contain any timeframe constraints. Moreover, Almblade’s letter on the eve of the deposition did not properly limit the scope of the deposition, and he did not seek a protective order or move to quash the Deposition Subpoena. As the Ninth Circuit has held, a “nonparty served with a subpoena has three options: it may (1) comply with the subpoena, (2) serve an objection on the requesting party in accordance with Civil Rule 45(c)(2)(B), or (3) move to quash or modify the subpoena in accordance with Civil Rule 45(c)(3).” *In re Plise*, 506 B.R. 870, 878 (B.A.P. 9th Cir. 2014). Because Almblade did not comply with any of these three options, this Court should order him to show cause why he should not be held in contempt.

B. The Court Should Compel Almblade to Appear for a Telephonic Deposition and Award DL Its Reasonable Fees and Costs

“Sanctions for civil contempt may be imposed to coerce obedience to a court order, or to compensate the party pursuing the contempt action for injuries resulting from the contemptuous behavior, or both.” *Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986). Such awards may include reasonable fees and expenses, including those incurred in filing a contempt motion and reply, preparing for and participating in a hearing on the motion, and conducting related depositions. *Bademyan v. Receivable*

1 *Mgmt. Servs. Corp.*, No. CV0800519MMMRZX, 2009 WL 605789, at *4 (C.D. Cal. Mar.
2 9, 2009) (citing cases). Furthermore, a court may compel appearance at a deposition as an
3 additional remedy. *Id.* at *6 (awarding attorney's fees and compelling attendance at a
4 subsequent deposition).

5 Here, DL respectfully requests that this Court award DL's reasonable and actual
6 attorneys' fees and costs incurred in bringing and adjudicating the present motion and
7 taking subsequent steps to obtain suitable deposition testimony from Almblade. *Donovan*
8 *v. Burlington Northern, Inc.*, 781 F.2d 680, 682 (9th Cir. 1986) ("[C]ourts in civil
9 contempt proceedings *must* award attorney's fees when such fees have actually been
10 incurred by the prevailing party and are otherwise allowable."). Finally, DL respectfully
11 requests that this Court order Almblade to appear at a second deposition by telephone in
12 order to provide full answers to DL's questions, including those related to events,
13 communications, and other matters occurring on or after February 19, 2014.

14 **IV. CONCLUSION**

15 For the reasons set forth herein, DL respectfully requests that the Court issue an
16 order (1) to show cause why Almblade should not be held in contempt for failure to
17 comply with the Deposition Subpoena; (2) compelling Almblade's attendance at a
18 telephonic deposition to provide further testimony consistent with the foregoing; and (3)
19 awarding fees and costs. Attached hereto is a proposed form of order to show cause.

20 DATED this 8th day of April, 2016.

21 SNELL & WILMER L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing. Courtesy copies of the foregoing were sent by mail to:

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